

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In Re: Methyl Tertiary Butyl Ether (MTBE)
Products Liability Litigation

**Master File No. 1:00 - 1898
MDL 1358 (SAS)
M21-88**

Civil Action

This Document Relates To:

*New Jersey Dept. of Env'tl. Prot., et al. v.
Atlantic Richfield Co., et al.*, No. 08 Civ. 312

**PLAINTIFFS' REPLY TO DEFENDANT GETTY PROPERTIES
CORPORATION'S LOCAL 56.1 STATEMENT OF ADDITIONAL FACTS**

In accordance with Federal Rule of Civil Procedure 56, Southern District of New York's Local Civil Rule 56.1, and this Court's Individual Rules and Procedures IV.I, Plaintiffs file their Reply to Defendant Getty Properties Corporation's (hereafter "GPC") Local Rule 56.1 Statement filed in Opposition to the Third Party Defendants' Statement of Material Facts in Support of their Motion for Summary Judgment. Plaintiffs previously filed a 56.1 Statement in Response to the Third Party Defendants' 56.1 Statement filed in support of their Motion for Summary Judgment and this Response supplements Plaintiffs' previously filed 56.1 Statement.

**PLAINTIFFS' REPLY TO GETTY PROPERTIES CORPORATION'S
STATEMENT OF ADDITIONAL FACTS**

1. GPC's claims against Dhandi are based on contribution and indemnity pursuant to the New Jersey Joint Tortfeasors Act, N.J.S.A. 2A:53A-1, and the Comparative Negligence Act, N.J.S.A. 2A:15-5, *et seq.*

RESPONSE: Undisputed.

2. Dhandi delivered fuel oil to H.P. Delta from 2003 to 2006.

RESPONSE: Undisputed. Plaintiffs further incorporate Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's 56.1 Statement, Additional Fact No. 70.

3. Dhandi's attorney in the New Jersey state action concurs that fuel oil was spilled during a delivery to H.P. Delta. See February 2, 2007 Letter from Gary Pasricha to Stuart L. Lieberman.

RESPONSE: Undisputed. Plaintiffs further incorporate Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's 56.1 Statement, Additional Fact No. 67.

4. The owner of H.P. Delta, Harbans Singh, confirmed that in 2004, an employee of Dhandi spilled gasoline when he was disconnecting the pipes. See Deposition of Harbans Singh, dated December 22, 2010, pp. 169-170.

RESPONSE: Undisputed.

5. GPC never owned or operated the H.P. Delta station.

RESPONSE: Disputed. GPC Fact No. 5 is vague because the "H.P. Delta station" was not the "H.P. Delta station" until the year 2003. GPC owned underground storage tanks at the station until 1987. Plaintiffs do not dispute that GPC did not own or operate the "H.P.Delta station"

between 2003 to the present. See Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's 56.1 Statement No. 3; *see also* Declaration of Molly McGinley Han (**hereafter "Han Decl."**) filed in support of Plaintiffs' Reply to Getty's Response to Dhandi Transport's Motion for Summary Judgment, Ex. 6 (3/02/10 Letter of J. Dicker to M. Lewis).

6. GPC never sold gasoline containing MTBE to the owner of H.P. Delta.

RESPONSE: Disputed. GPC Fact No. 6 is vague because "H.P. Delta" was not "H.P. Delta" until the year 2003. See Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's 56.1 Statement No. 15. Plaintiffs do not dispute that GPC did not sell gasoline containing MTBE to the owner of H.P. Delta between 2003 and the present.

7. There is no evidence that the soil contamination found in 1987 at H.P. Delta contained MTBE nor any record showing any groundwater contamination at H.P. Delta in 1987.

RESPONSE: Disputed. The soil contamination found in 1987 at H.P. Delta was not tested for MTBE at the time, but when the soil was subsequently tested for MTBE, MTBE was discovered in large quantities. Plaintiffs also incorporate Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's, Plaintiffs' Additional Facts Nos. 58, 62-66.

Samples collected on-site reveal that the highest concentrations of MTBE were detected in monitoring well 8 (MW-8), located close to the former Getty USTs. Declaration of Michael D. Axline filed in support of Plaintiff's Opposition to Dhandi Transport's Motion for Summary Judgment (**hereafter "Axline Decl."**), Ex. 13 at NJDEP-SITE233-005316 (Triassic Technology

Report); Han Decl. Ex. 1 at 34 & Fig. 2a (Aquilologic Report); and Han Decl Ex. 5 at Fig. 2, NJDEP-SITE233-006877 (Louis Berger Group, Inc. Draft Report). MTBE has been detected in MW-8 at levels as high as 276,000 ug/L (ppb). Han Decl. Ex. 1 at 17, 34 (Aquilologic Report); *see also* Han Decl. Ex. 2 at 5, (HCR Report).

The third party defendant's report from Triassic Technology focused on the age of the gasoline found at the site and opined that some of the contamination at the site originated from the 1980s, from the Getty tanks. Han Ex. 4 at 27 (Triassic Technology Report).

8. In 1987, there was minimal soil contamination at the H.P. Delta site, the contaminated soil was removed and no further action was required by the NJDEP. See April 2, 2013 Report of GPC's expert, James A. Schaefer, Jr. of Kleinfelder, pp. 9-10.

RESPONSE: Disputed. The first time soil and groundwater were tested for MTBE at the H.P. Delta site, MTBE was discovered in large quantities. Plaintiffs incorporate Plaintiffs' Additional Facts Nos. 58, 62-66 & Axline Decl. Ex. 12 (12/15/87 Administrative Order).

Samples collected on-site reveal that the highest concentration of MTBE were detected in monitoring well 8 (MW-8), located close to the former Getty USTs. Axline Decl. Ex. 13 at NJDEP-SITE233-005316; Han Decl. Ex. 1 at 34 & Fig. 2a (Aquilologic Report); and Han Decl. Ex. 5 at Fig. 2, NJDEP-SITE233-006877 (Louis Berger Group, Inc. Draft Report). MTBE was detected in MW-8 at levels as high as 276,000 ug/L (ppb). Han Decl. Ex. 1 at 17, 34 (Aquilologic Report); *see also* Han Decl. Ex. 2 at 5 (HCR Report.)

The third party defendant's report from Triassic Technology focused on the age of the

gasoline found at the site and opined that some of the contamination at the site originated from the 1980s, from the Getty tanks. Han Ex. 4 at 27 (Triassic Technology Report).

9. The owner of the site, Robert Melecci, installed new tanks in an entirely new tank field sometime around 1989.

RESPONSE: Disputed. Plaintiffs incorporate its Additional Facts Nos. 65 and 66. Also dispute the materiality of GPC Fact No. 9.

10. MTBE was first detected at H.P. Delta in 2006.

RESPONSE: Undisputed that MTBE was detected the first time tests were conducted for MTBE at the H.P. Delta site. Undisputed that the first time MTBE tests were conducted at the H.P. Delta site was in 2006. Plaintiffs dispute any implication that MTBE was not present in the soil or groundwater in 1987. Plaintiffs also incorporate Plaintiffs' Additional Facts Nos. 58-60, 62-66.

Samples collected on-site reveal that the highest concentration of MTBE were detected in monitoring well 8 (MW-8), located close to the former Getty USTs. Axline Decl. Ex. 13 at NJDEP-SITE233-005316; Han Decl. Ex. 1 at 34 & Fig. 2a (Aquilogic Report); and Han Decl. Ex. 5 at Fig. 2, NJDEP-SITE233-006877 (Louis Berger Group, Inc. Draft Report). MTBE was detected in MW-8 at levels as high as 276,000 ug/L (ppb). Han Decl. Ex. 1 at 17, 34 (Aquilogic Report); *see also* Han Decl. Ex. 2 at 5 (HCR Report).

The third party defendant's report from Triassic Technology focused on the age of the

gasoline found at the site and opined that the contamination at the site originated from the 1980s, from the Getty tanks. Han Ex. 4 at 27 (Triassic Technology Report).

11. Free product was found floating in and around the owner of H.P. Delta's new tank field where Dhandi delivered gasoline, and upon testing, MTBE was detected at the site. See Plaintiffs' Answer to Defendants' Request for Admissions Regarding the H.P. Delta Trial Site, No. 8; January 2013 Revised Site Summary Report of Anthony Brown, p. 46; August 18, 2006 Letter from the Township of Woodbridge to Robert Melecci.

RESPONSE: Undisputed.

12. Robert Melecci joined Dhandi as a third-party defendant in the New Jersey state action, alleging that Dhandi was negligent in its delivery of gasoline to H.P. Delta by spilling and overfilling during deliveries. See Robert Melecci's Answer to First Amended Complaint, Counterclaim, Third Party Complaint, Separate Defenses, Claim for Contribution, Answer to Crossclaim, Crossclaim, Request for Statement of Damages, Request for Allocation, Designation of Trial Counsel, Certification, Jury Demand, p. 9.

RESPONSE: Undisputed.

13. In the New Jersey state action, Robert Melecci testified that he often saw Dhandi's employees spilling gasoline when making deliveries to H.P. Delta.

Q. Did you ever see [Dhandi] spilling gas?

A. Yes.

Q. How often?

A. Every time.

.....

Deposition of Robert Melecci dated November 24, 2008, p. 54.

Q. And when you say they spilled gas every time, were you there every time that they came to deliver?

A. Every time I seen 'em, yes.

Q. And how often would that be?

A. I'd say at least 60 percent of the time.

.....

Deposition of Robert Melecci dated November 24, 2008, p. 55.

Q. And when they would overfill, the fuel would come out the vent pipe?

A. Yes.

.....

Deposition of Robert Melecci dated November 24, 2008, pp. 57-58.

Q. ... So the vent pipe blow-back that you're talking about occurs 25 feet from area B which has been identified by the DEP as the area of concern; is that right?

A. Yes.

Q. Did they spill anything onto the concrete or the hard surfaces?

A. Yes.

.....

Deposition of Robert Melecci dated November 24, 2008, p. 58.

RESPONSE: Undisputed.

14. Robert Melecci observed spilled gasoline which "pooled underneath the truck" during a delivery by Dhandi. Deposition of Robert Melecci dated November 24, 2008, pp. 65-66; January 22, 2007 Letter from Anthony Ambrosio to Stuart Lieberman.

RESPONSE: Undisputed.

15. When Robert Melecci informed an employee from Dhandi of the "pooled" gasoline, the employee "just turned around and kicked snow on it and left." Deposition of Robert Melecci dated November 24, 2008, p. 67.

RESPONSE: Undisputed.

16. Robert Melecci also testified that he observed Dhandi's employees spilling gasoline at H.P. Delta during deliveries made prior to 2006. Deposition of Robert Melecci dated November 24, 2008, p. 68.

RESPONSE: Undisputed.

17. Robert Melecci's 2008 testimony conflicts with his second deposition taken on September 12, 2012 wherein he testified that he saw Dhandi's employees spilling gasoline approximately six (6) times. Deposition of Robert Melecci dated September 12, 2012, p. 96.

RESPONSE: Disputed. Mr. Melecci testified that he could not remember the number of times he saw a spill and that he could not put a number on the amount of times he saw a spill and that his memory was fresher during the first deposition than at the second deposition. Han Decl. Ex. 14 at 98-99 (9/12/12 Deposition of R. Melecci.)

18. GPC's expert, Jim Schaefer, indicates that the MTBE contamination was the result of the 2004 to 2006 hydrocarbon spills at the H.P. Delta site from the new UST system. It is his expert opinion that one of the causes of the hydrocarbon release is from the spills/overfilling of

gasoline by Dhandi during its deliveries to H.P. Delta. See April 2, 2013 Report of GPC's expert, James A. Schaefer, Jr. of Kleinfelder, p. 23.

RESPONSE: Undisputed that Defendant GPC's expert prepared a Report stating the opinion summarized in GPC's Additional Fact No. 18. Disputed that the spills that occurred between 2004 and 2006 were the only causes of MTBE contamination at the site. Plaintiffs incorporate Additional Facts Nos. 73-76.

19. Plaintiffs' expert, Anthony Brown, also considers H.P. Delta as one of the sources of the MTBE contamination. Mr. Brown opines that "[r]eleases of gasoline containing MTBE have occurred at the [H.P. Delta] site" and that "MTBE has migrated off-site beyond [H.P. Delta's] boundaries." See January 2013 Revised Site Summary Report of Anthony Brown, p. 46.

RESPONSE: Undisputed.

20. Gary Lipsius, who works in the Bureau of Investigation, Design and Construction at the NJDEP, testified that the H.P. Delta site contributed "in some part" to the MTBE contamination. See Deposition of Gary Lipsius, dated August 2, 2012, pp. 43-44. He also testified that it was "likely" that the H.P. Delta site was a source of the MTBE contamination, although he was not certain. Id. at pp. 64-65.

RESPONSE: Undisputed. Plaintiffs further incorporate their Responses to the Third Party Defendants' Facts Nos. 47-51.

ADDITIONAL STATEMENT OF FACTS

Continuing the numerical sequence from Plaintiffs' 56.1 Statement in Opposition to Dhandi Transport's 56.1 Statement, Plaintiffs assert the following additional statement of facts relating to Getty's 56.1 Statement:

73. The NJDEP's 1987 Administrative Order found:

"3) One tank which had been in use as late as the week of June 22, 1987, was observed to have at least six (6) holes and a strong odor of gasoline was noted in the excavated soil. Thereby confirming a discharge of a pollutant into the waters and/or onto the land of the State."

"5) Excavation of contaminated soil due to the leak in the tank began on July 2, 1987. However, on July 21, 1987, excavation was terminated for safety reasons."

"6) The above mentioned excavated soil was placed on top of plastic and then completely covered with plastic to preclude any further discharges of said pollutants into the waters or onto the lands of the State The plastic covering is used as a temporary measure to store contaminated soil awaiting proper waste classification and proper and permanent disposal. Routine maintenance is necessary to insure that the cover remains in place.

"7) In August 1987 it was observed that the plastic covering over the pile of contaminated soil had come off, therefore, leaving the contaminated soil uncovered. The potential then existed for water runoff to the waters and lands of the State and possible release of vapors to the environment. Based upon routine inspections it was determined that the contaminated soil was again properly covered on November 27, 19987 by the station owner, due to numerous

public complaints.”

“9) As of the date of this Order [12-15-87], Getty has not made any effort to remove and properly dispose of any contaminated soil or to forward all soil sampling results to the Department, verifying complete cleanup of the discharge.”

Axline Decl. Ex. 12 (12/15/1987 Administrative Order.)

74. Samples collected at the Site reveal that the highest concentration of MTBE were detected in monitoring well 8 (MW-8), the well closest to the former Getty USTs. Axline Decl. Ex. 13 at NJDEP-SITE233-005316; Han Decl. Ex. 1 at 34 & Fig. 2a (Aquilogic Report); and Han Decl. Ex. 5 at Fig. 2, NJDEP-SITE233-006877(Louis Berger Group Report). MTBE was detected in MW-8 at levels as high as 276,000 ug/L (ppb). Han Decl. Ex. 1 at 17, 34 (Aquilogic Report); *see also* Han Decl. Ex. 2 at 5 (HCR Report).

75. The third party defendant’s report from Triassic Technology focused on the age of the gasoline found at the site and opined that the contamination at the site originated from the 1980s, from the Getty tanks. Han Decl. Ex. 4 at 27 (Triassic Technology Report).

76. Getty owned the underground storage tanks at the HP Delta site and supplied gasoline to those tanks from 1975 to 1987. See Plaintiffs’ 56.1 Statement in Opposition to Dhandi Transport’s 56.1 Statement No. 3; *see also* Han Decl. Ex. 6 (3/02/10 Letter of J. Dicker to M. Lewis).

77. The HP Delta Site was branded a “Getty” station between 1975 and 1987. Axline Decl. Ex.1 at 18-20 (9/02/12 Depo. of R. Melecci); *see also* Han Decl. Ex. 6 (3/02/10 Letter of J. Dicker to M. Lewis).

78. In 1975 Getty’s corporate name was “Getty Oil.” Texaco purchased Getty Oil in 1984, and in February, 1985, sold the “Getty” assets to “Power Test Corporation.” Han Decl. Ex. 8 (Getty Realty Corp. 10-K at Ex. 10.3). Power Test Corporation then changed its name to “Getty Petroleum” and eventually to “Getty Properties.” Axline Decl. Ex. 10 at 1, 5 (GPC’s Answers and Objections to Plaintiffs’ First Set of Requests for Admissions).¹

79. When Texaco bought Getty in 1984 and sold it to Power Test/Getty in 1985, the parties agreed that Texaco would supply Power Test/Getty with gasoline. Han Decl. Ex. 8 at 70-71 (Getty Realty Corp. 10-K at Ex. 10.3). Spreadsheets produced by Texaco in discovery document Texaco’s extensive gasoline sales to Power Test/Getty between 1985 and 1988. Han Decl. Ex. 9, CHEVMDL1358_NJDEP-UTX 00000000095-124.) When Texaco sold “Getty” assets to Power Test Corporation (n/k/a Getty Properties), it included the contract dealer agreement with Melecci. Axline Decl. Ex. 10 at 5 (GPC’s Answers and Objections to Plaintiffs’ First set of Requests for Admissions).

¹ In 1997, Getty Properties spun-off its petroleum marketing business to Getty Petroleum Marketing Inc. or “GPMI”. Han Decl. Ex. 7 (8/06/08 Opinion and Order of J. Scheindlin in *In re MTBE: County of Suffolk v. Amerada Hess Corp.*)

80. During the time that Texaco was supplying gasoline to Power Test/Getty, Texaco used MTBE as an octane enhancer in its gasoline. As a 1989 ARCO White Paper noted: “Eastern U.S. producers [of MTBE] in addition to ARCO Chemical include Amoco, Champlin, Chevron, Exxon, Phillips, Shell and Texaco.” Han Decl. Ex. 12 at LAN0326912 (ARCO “White Paper”).

81. In the *County of Suffolk* case in this MDL, Getty admitted that pre-1997, GPC purchased gasoline containing MTBE for retail sale and distribution. Han Decl. Ex. 11 (Defendant Getty Properties Corp.’s Amended Disclosure Pursuant to June 9, 2005 Directive).

82. Getty does not deny that the gasoline it supplied to Melecci’s gas station between 1985 and 1987 contained MTBE. Axline Decl. Ex. 10 at 5 (GPC’s Answers and Objections to Plaintiffs’ First set of Requests for Admissions). When Plaintiffs asked Getty to admit that Getty “through one or more distributors, supplied gasoline product containing MTBE to Rob’s Service Station (now known as HP Delta), located at 439 Lake Avenue, Woodbridge, New Jersey, from between 1983 to 1987,” Getty responded: “As to that time period, Getty Properties can neither admit nor deny this Request as after reasonable inquiry the information known or readily available is insufficient to enable Getty Properties to admit or deny this request.” *Id.*

83. MTBE was in gasoline throughout New Jersey during the time period Getty was

supplying gas to the HP Delta Site. Han Decl. Ex. 10 at LAN0187313, LAN0187318; Axline Decl. Ex. 4 at 3 (Aquilologic Report); Axline Decl. Ex. 11 at 6 (Triassic Technology Report).

Dated this 27th day of January, 2014.

Respectfully submitted,

/s/

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PROOF OF SERVICE VIA LEXISNEXIS FILE & SERVE

New Jersey Department of Environmental Protection, et al. v. Atlantic Richfield Co., et al.
United States District Court, Southern District of New York, Case No. 08 Civ. 00312 (SAS)

I, the undersigned, declare that I am, and was at the time of service of the paper(s) herein referred to, over the age of 18 years and not a party to this action. My business address is 1050 Fulton Avenue, Suite 100, Sacramento, CA 95825-4225.

On the date below, I served the following document on all counsel in this action electronically through LexisNexis File & Serve:

**PLAINTIFFS' REPLY TO DEFENDANT GETTY PROPERTIES
CORPORATION'S LOCAL 56.1 STATEMENT OF ADDITIONAL FACTS**

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on January 27, 2014, at Sacramento, California.


KATHY HERRON